Commissioner Of Income-Tax, Bombay & ... vs Ishwarlal Bhagwandas And Others on 7 May, 1965

Equivalent citations: 1965 AIR 1818, 1966 SCR (1) 190

Author: J.C. Shah

Bench: J.C. Shah, P.B. Gajendragadkar, K.N. Wanchoo, J.R. Mudholkar, S.M. Sikri

PETITIONER:
COMMISSIONER OF INCOME-TAX, BOMBAY & ANOTHER

Vs.

RESPONDENT:
ISHWARLAL BHAGWANDAS AND OTHERS

DATE OF JUDGMENT:
07/05/1965

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
MUDHOLKAR, J.R.
SIKRI, S.M.

CITATION:
1965 AIR 1818 1966 SCR (1) 190
CITATOR INFO :
R 1966 SC1445 (9)
RF 1966 SC1888 (4)
F 1968 SC1227 (3)
RF 1986 SC1272 (100)

ACT:
Constitution of India, 1950, Art. 133(1)(c)-"Civil Proceeding", Meaning of.
Income-tax Act (11 of 1922), s. 18A(6), proviso-Scope of.

HEADNOTE:
The respondents filed under s. 18A(2) of the Income-tax Act, 1922, estimates of their income for the assessment year

1948, 1948-49 and made advance payments of tax. On 31st MarCh 1953 the regular assessment was made, but the Income-tax Officer omitted to charge penal interest as required by s. 18A(6) even though the tax paid was less than 80% of the tax determined. The error was discovered during audit and the Income-tax Officer rectified the error after notice in 1956, under s. 35 of the Act. When the notice demanding interest was issued, the respondents challenged the order before the Commissioner on the ground that the omission to charge pepal interest could not be considered a mistake apparent from the record, in view of the proviso to s. 18A(6), which was introduced on 24th May 1953 but was made retrospective from 1st April 1952, giving power to the Income-tax Officer to reduce or waive the interest payable by the assessee. The Commissioner did not accept the contention. The respondents then moved the High Court under Art. 226 of the Constitution and the High Court quashed the notice of demand.

In his appeal to this Court, the Commissioner contended that : (i) no retrospective operation was effectively given to the proviso, because the rules, which alone could render that discretion operative, were framed only in December 1953, and (ii) there was nothing to show that the Income-tax Officer had purported to exercise his discretion when he passed the order of assessment but did not impose penal interest under s. 18A(6). Me respondent raised a preliminary objection that the appeal was incompetent because (a) the High Court had no power under Art. 133 to certify the appeal as a proceeding under Art. 226 was not a civil proceeding within the meaning of Art. 133, and (b) even if some proceedings under Art. 226 could be treated as civil proceeding, when relief is sought against the levy of a tax, the proceeding could not be so treated as it comes under " other proceeding" as contrasted with a civil proceeding, referred to in Art. 132(1).

HELD : (i) (by Full Court) : There is no ground for restricting the expression "civil proceeding" only to those proceedings which arise out of civil suits or proceedings which are tried as civil suits, nor is there any rational basis for excluding from its purview proceedings instituted and tried in the High Court in exercise of its jurisdiction under Art. 226, where the aggrieved party seeks -relief against infringement of civil rights by authorities purporting to act in exercise of the powers conferred upon them by revenue statutes. [200 B-D]

(Per P. B. Gajendragadkar, C. J., K. N. Wanchoo, J. C. Shah and S. M. Sikri, JJ) : The expression "civil proceeding" covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. It is one in which a person seeks to enforce by appropriate relief the alleged in-

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fringement of his civil rights against another person or the State and which, if the claim is proved, would result in the declaration express or implied of the right claimed and -relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status, etc. By a petition for a writ under Art. 226, extraordinary jurisdiction, which is undoubtedly special and exclusive of the High Court is invoked. But on that account the nature of the proceeding in which it is exercised is not altered. The character of a proceeding depends, not upon the nature of the Tribunal which is invested with authority to grant -relief but upon the nature of the right violated and the appropriate relief which may be claimed. [196B, G, H; 197H]

There is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State. If a person is called upon to pay tax which the State is not competent to levy, or which is not imposed in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are infringed in a manner not warranted by the statute, a proceeding to obtain relief, whether it is from the tribunal set up by the taxing statute or from the civil court, would be regarded as a civil proceeding. The words "other proceeding" in Art. 132(1) refer only to proceedings which may be neither civil nor criminal, such as, proceedings for contempt of court and for exercise of disciplinary jurisdiction against professionals. it is not because a reference under s. 256 of the Income-tax Act to the High Court is not a civil proceeding that a certificate under Art. 133 may not be granted, necessitating the enactment of s. 261 for granting such a certificate, but, because of the advisory character of the jurisdiction exercised by the High Court, the High Court's opinion is not a judgement, decree or order within the meaning of Art. 133. [196 D-G; 197E]

(ii) (By Full Court) : It is true that the proviso operates only in respect of cases and under circumstances as may be prescribed by the rules, but as soon as the rules were framed which effectuate the purpose for which the proviso was enacted, the proviso and the rules became effective retrospectively from 1st April 1952. [202E]

T. Cajee v. U. Jormanik Slem, [1961] 1 S.C.R. 750, distinguished.

M. K. Venkatachalam I.T.0. v. Bombay Dyeing and Manufacturing Co. Ltd. [1959] S.C.R. 703, applied.

(iii) (Per P. B. Gajendragadkar, C.J., K. N. Wanchoo, J. C. Shah and S. M. Sikri, JJ.) : The High Court was right in setting aside the order passed by the Commissioner without considering the proviso (5) to s. 18A(6) which was clearly applicable to the case of the, assesse. [205E]

The Income-tax Officer, on the language of s. 18A(6) on the

date of making the assessment order, was bound to impose liability for payment of penal interest. But by reason of the retrospective operation given to the proviso added in 1953, the Officer must be deemed to have possessed discretion to reduce or waive interest payable by the assessee, on the date on which he made the assessment order. The order which did not take note of the law deemed to be in force must be regarded as defective; and the fact that the offered could not in making the assessment have adjusted his approach to the problem before him in the light of those provisions is irrelevant in considering the legality of his order. [202A, C; 205 B-C]

Per Mudholkar, J. (dissenting) : Even though the proviso and the rule must be deemed to have been in force on 1st April 1952, the omi-

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ssion to charge penal interest at the time of making the regular assessment could not be ascribed to the exercise of discretion by the income-tax Officer. In fact, when he made the assessment, he had no discretion and was bound by law to charge penal interest. His omission to do so must be ascribed to an oversight and not to deliberateness. He was competent to rectify the mistake under s. 35 and when he exercised his power under the section he himself accepted the position that what he did earlier was through mistake. [209 C-E, G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1003 and 1004 of 1963.

Appeals from the judgment and orders dated November 13, 1958 of the Bombay High Court in Miscellaneous Petition No. 217 and 218 of 1958.

C. K. Daphtary, Attorney-General, R. Ganapathy Iyer and B. R. G. K. Achar, for the appellants (in both the appeals).

A. V. Viswanatha Sastri, C. A. Ramachandran, J. B. Dada- chanji, 0. C. Mathur and Ravinder Narain, for the respondent (in both the appeals).

The Judgment of Gajendragadkar, C.J., Wanchoo, Shah, and Sikri, JJ. was delivered by Shah, J. Mudholkar, J. delivered a dissenting Opinion.

due notice to the assessee".

Shah, J. The 1st Income-tax Officer, C-11 Ward, Bombay served a notice tinder s. 18-A(1) of the Indian Income-tax Act, 1922 calling upon Bhagwandas Kevaldas-who will hereinafter be called 'the

assessee'-to pay in four equal installments Rs. 25,973/5 as advance-tax for the assessment year 1948-49. On September 17, 1947 the assessee filed an estimate of his income under s. 18-A(2) and of the tax payable by him, and on January 10, 1948 he filed a revised estimate. An order under S. 23-B of the Act provisionally assessing the income was made by the Income-tax Officer and pursuant thereto on August 23, 1950 the assessee paid the tax so assessed. Regular assessment of the income of the assessee was made on March 31, 1953 by the Income-tax Officer, and it was found that the tax paid on the basis of the estimate of the assessee was less than eighty per cent of the tax determined as a result of the regular assessment. But the Income-tax Officer made no charge for interest under sub-s. (6) of S. 18-A of the Income-tax Act.

The departmental auditor raised an objection in auditing accounts of C-11 Ward that a mistake was committed by the Income-tax Officer in failing to charge interest in making the order of assessment against the assessee. On September 21, 1956 the Income-tax Officer served a notice upon the assessee requiring him to show cause why the mistake in not levying interest be not rectified and why he should not be directed to pay "penal interest' under s. 18-A(6). On October 4, 1956 the Income- tax Officer recorded the following order :

> "During the internal checking of C-11 Ward, the Auditor has pointed out a mistake in not charging penal interest under s. 18-A(6). As this mistake is apparent from record the same is rectified under s. 35 after giving due notice to the assessee", and served a notice of demand calling upon the assessee to pay Rs. 14,929/10 as interest due under s. 18-A(6) for the period January 1, 1948 to July 22, 1950. In exercise of his powers under s. 33-A, by order dated Feb- ruary 1, 1958, the Commissioner of Income-tax confirmed the order of the Income-tax Officer rectifying the original order of assessment and imposing liability to pay interest, subject to the modification that interest be paid only till June 13, 1950.
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> The assessee then moved the High Court of Judicature at Bombay by a petition under Art. 226 of the Constitution for issue of a writ certiorari summoning the record of the case and for an order quashing or setting aside the order passed under s. 33-A(2) by the Commissioner of Income-tax and the order passed by the Income-tax Officer under s. 35 and the notice of demand pursuant to that order. The High Court of Bombay following its earlier judgment in the case of Shantilal Ravji v. M. C. Nair, IV Income-tax Officer, 'G' Ward, Bombay and Another(1) directed that the orders passed by the Income-tax Officer and by the Commissioner of Income- tax be quashed. Against the order passed by the High Court the Commissioner of Income-tax and the Income-tax Officer have, with certificate granted by the High Court, appealed to this Court.
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> At the hearing of this appeal counsel for the assessee raised an objection in liming that the appeal filed by the Commissioner and the Income-tax Officer was incompetent. because the High Court had no power under Art. 133 of the Constitution to certify a proposed appeal against an order in a proceeding commenced by a petition for the issue of a writ under Art. 226 of the Constitution. It

was urged that the proceeding before the High Court was not " a civil proceeding" within the meaning of Art. 133. Article 133 of the Constitution, insofar as it is material, by the first clause provides (1) (1958) 34 I.T.R. 439.

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

(a) that the amount or value of the subject-

matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees***; or

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

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

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

This Court is invested by the Constitution with appellate jurisdiction of great amplitude exercisable over all courts and tribunals in India. The jurisdiction may be exercised in respect of any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal other than a judgment, determination, sentence or order made or passed by any court or tribunal under any law relating to the Armed Forces: Art. 136. Exercise of this power depends solely upon the discretion of the Court. Appeals lie to this Court also from orders passed in certain classes of cases when certified by the High Courts. An appeal lies from the judgment, decree or final order of a High Court in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution : Art. 132(1). Am appeal also lies from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that the case satisfies the conditions in cls. (a), (b) or (c) of Art. 133(1), or from any judgment or final order or sentence in a criminal proceeding of a High Court, if the case falls within the description of cls. (a) & (b) of Art. 134, or if the High Court certifies that the case is a fit one for appeal. It is clear that under Art. 136 against the adjudications of all courts and tribunals (subject to the exception already noticed) whatever be the character of the proceeding, appeals lie with leave to this Court. An appeal lies against the adjudication of a High Court as a matter of right, whatever the

nature of the proceeding, with certificate that it involves a substantial question of law as to the interpretation of the Constitution, and in civil proceeding with certificate of the nature set out in cls.

(a), (b) or (c) of Art.. 133, and in criminal proceedings in conditions mentioned in cls. (a) and (b) and with certificate under cl. (c) of Art. 134.

Counsel for the assessee said that proceedings instituted in the High Court in exercise of its jurisdiction--original or appellate may be broadly classified as (i) proceedings civil, (ii) proceedings criminal, and (iii) proceedings revenue, and where the case does not involve a substantial question as to the interpretation of the Constitution, from an order passed in a proceeding civil, an appeal lies to this Court with certificate granted under Art. 133 of the Constitution, and from a judgment, final order or sentence in a criminal proceeding an appeal lies with certificate (,ranted under Art. 134 of the Constitution, but from an order passed in a proceeding relating to revenue the right of appeal may be exercised only with leave of this Court. Counsel seeks support for this argument primarily from the phraseology used in Art. 132 of the Constitution. That Article, by its first clause, provide-, "An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution."

Counsel relies upon the classification of proceeding made in Art. 132(1) and seeks to contrast it with the phraseology used in Arts. 133(1) & 134(1). He says that "other proceeding" in Art. 132(1) falls within the residuary class of proceedings other than civil or criminal, and such a proceeding includes a revenue proceeding. The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal. There are certain proceedings which may be regarded as neither civil nor criminal. For instance, proceeding for contempt of Court and for exercise of disciplinary jurisdiction against lawyer or other professionals, such as chartered accountants may not fall within the classification of proceedings, civil or criminal. But there is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State. The primary object of a taxation statute is to collect revenue for the governance of the State or for providing specific services and such laws directly affect the civil rights of the tax- payer. If a person is called upon to pay tax which the State is not competent to levy, or which is not imposed in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are infringed in a manner not warranted by the statute, a proceeding to obtain relief whether it is from the tribunal set up by the taxing statute, or from the civil court would be regarded as a civil proceeding. The character of the proceeding, in our

judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is therefore one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, com-

pensation, delivery of specific property, enforcement of personal rights, determination of status etc. There is therefore under the Constitution a right of appeal to, this Court with special leave from the adjudications of all courts and tribunals (except tribunals constituted by or under laws relating to Armed Forces). An appeal also lies to this Court against all adjudications by a High Court from judgments, decrees and orders in cases in which a substantial question as to the interpretation of the Constitution is involved, whatever the nature of the proceeding. Appeals from criminal proceedings lie as a matter of right in cases falling within cls. (a) and (b) of Art. 134, and in cases certified as fit for appeal under cl.

(c) of Art. 134, and from civil proceedings of the nature certified by the High Court under Art. 133(1) cls. (a), (b) or (c).

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

133. Similarly the enactment of s. 54 of the Land Acquisition Act which expressly provides for an appeal to this Court, subject to the provisions contained in s. 110 of the Code of Civil Procedure, from an award, or from any part of the award made by the Court is easily appreciated, if regard be had to the character of the adjudication, which is in the nature of an award in an arbitration: see Rangoon Botatoung Company Ltd. v. The Collector, Rangoon(1). By a petition for a writ under Art. 226 of the Constitution, extraordinary jurisdiction of the High Court to issue high prerogative writs granting relief in special cases to persons aggrieved by the exercise of authority-statutory or otherwise-by public officers or authorities is invoked. This jurisdiction is undoubtedly special and exclusive, but on that account the nature of the proceeding in which it is exercised is not altered. Where a revenue (1) L.R. 39 I.A. 197.

authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved and when relief is claimed in that behalf it is a civil proceeding, even if relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs. It is not

easy to attribute to the expression "revenue proceeding" any precise connotation, and in interpreting Arts. 132 (1) and 133 it would be difficult to project the somewhat anomalous provision contained in s. 226 of the Government of India Act, 1935 under which, for historical reasons, it was enacted that unless otherwise provided by the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force. This section barred the High Court from exercising original jurisdiction in matters concerning revenue. There was no such bar against subordinate courts, nor against the exercise of appellate jurisdiction by the High Courts in matters concerning revenue instituted in subordinate courts. No provision has been made in the Constitution similar to S. 226 of the Government of India Act, and there is no reason to think that it was intended to deprive the High Court of its power to certify cases concerning revenue, by enacting that the High Court may certify a case in a civil proceeding. No ground is suggested for acceptance that while removing the ban against the High Court's original jurisdiction in matters concerning revenue, the Constitution imposed another ban against the exercise of power to certify cases decided by the High Court in the appellate as well as original jurisdiction when the cases concerned revenue. We have already set out our reasons for holding that a Pro- ceeding taken for recovery of a tax is not "other proceeding' under Art. 132 (1) : such a proceeding is a civil proceeding within the meaning of Art. 133(1). The object of referring to "other proceeding" in that clause is merely to emphasize that adjudications made in proceedings which are not included in the description civil or criminal would still attract the provisions of Art. 132 (1) in case they raise a substantial question of law as to the interpretation of the Constitution. A proceeding in which relief is claimed against action of revenue authorities is included in the civil proceeding and not in "other proceeding" within the meaning of Art. 132(1), and an aggrieved party's right to appeal to this Court from orders in those proceedings is exercisable in the same manner as it would be in the case of a decree, order or judgment in any other civil proceeding. A large number of cases have arisen before the High Courts in India in which conflicting views about the meaning of the expression "civil proceeding" were expressed. In some cases it was held that the expression "civil proceeding" excludes a proceeding instituted in the High Court -for the issue of a -writ whatever may be the nature of the right infringed and the relief claimed: in other cases it has been held that a proceeding resulting from an application for a writ Linder Art. 226 of the Constitution may in certain cases be deemed to be a "civil proceeding", if the claim made, the right infringed and the relief sought warrant that inference : in still another set of cases it has been held that even if a proceeding commenced by a petition for a writ be generally categorised as a civil proceeding, where the jurisdiction which the High Court exercises relates to revenue, the proceeding is not civil. A perusal of the reasons given in the cases prompt the following observations. There are two preliminary conditions to the exercise of the power to grant certificate : (a) there must be a judgment, decree or final order, and that judgment, decree or final order must be made in a civil proceeding. An advisory opinion in a tax reference may not be appealed from with certificate under Art. 133, because the opinion is not a judgment, decree or final order, and (b) a proceeding does not cease to be civil, when relief is claimed for enforcement of civil rights merely because the proceeding is not tried as a civil suit. In a large majority of the cases in which the jurisdiction of the High Court to certify a case under Art. 133(1) was negatived it appears to have been assumed that the expression "other proceeding" used in Art. 132 of the Constitution is or includes a proceeding of the nature of a revenue proceeding, and therefore the expression "civil proceeding" in Art. 133(1) does not include a

revenue proceeding. This assumption for reasons already set out is erroneous.

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

On a careful review of the provisions of the Constitution, we are of the opinion that there is no ground for restricting the expression "civil proceeding" only to those proceedings which arise out of civil suits or proceedings which are tried as civil suits, nor is there any rational basis for excluding from its purview proceedings instituted and tried in the High Court in exercise of its jurisdiction under Art. 226, where the aggrieved party seeks relief against infringement of civil rights by authorities purport- ing to act in exercise of the powers conferred upon them by revenue statutes. The preliminary objection raised by counsel for the assessee must therefore fail. We may now turn to the question which is raised on the merits in this appeal. Section 18-A which was added by the Indian Income-tax (Amendment) Act 11 of 1944 for imposing liability for advance payment of tax enacts by the first sub-section, insofar as it is material, that where there is no provision made for deduction of income-tax at the time of payment, the Income-tax Officer may on or after the commencement of any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which, he has been assessed. Contrary to the two basic concepts of the scheme of the Indian Income-tax Act under which tax is charged upon the income of the previous year and not the income of the assessment year, and liability does not arise until the annual Finance Act is passed charging income to tax, s. 18-A introduces within the scheme of the Act the principle of advance payment of tax and authorises collection of advance tax before the assessment year commences and before even the Finance Act which imposes liability is enacted. But this tax is advance tax which is to be adjusted against tax payable on the income of the financial year in the light of the total income which may be computed and also in the light of the Finance Act which may be passed. Assessment and demand for advance payment of tax are therefore provisional. If ultimately the advance tax paid is in excess of the tax finally assessed, refund will be granted to the assessee; if the advance tax paid is less than what is payable, the balance becomes payable on the final assessment. With the object of enforcing compliance with the provision for payment of advance tax effectively, and at the same time to protect the assessee from avoidable harassment, the Legislature made a provision under sub-s. (2) of s. 18-A enabling the assessee before the last instalment is due to intimate his own estimate of the income of the previous year to the Income- tax Officer and the tax payable by him calculated in the manner laid down in sub-s. (1) and to pay such amount as accords with his estimate. Provision is also made for submitting revised estimate of income. The Legislature by sub-s. (6) also on the other

hand penalises an assessee who seeks to evade liability to pay advance tax by underestimating his income by providing that if in any year an assessee paid tax under sub-s. (2) or (3) on the basis of his own estimate and the tax so paid is less than eighty per cent of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of s. 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent per annum from the 1st day of January in the financial year in which the tax was paid up to the date' of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent. Subsection (6) as originally enacted left no discretion to the Income-tax Officer: if the estimate fell below the prescribed limit, the Income-tax Officer was obliged to direct payment of interest. But by Act 25 of 1953 which was enacted with retrospective operation from April 1, 1952, the following proviso was added as the fifth proviso to s. 18-A(6):

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

The amendment authorised the Income-tax Officer to reduce or waive the interest payable by the assessee in such cases and under such circumstances as may be prescribed. It was given retrospective operation from April 1, 1952, and the discretion conferred upon the Income-tax Officer became, by fiction of law, exercisable as from April 1, 1952, even though the Act came into force from May 24, 1953, and the cases in which and circumstances under which the discretion was to be exercised were prescribed by the Central Government by r. 48 in December 1953.

The Income-tax Officer in the present case, on the language used in the statute as it stood on the date of making the order of assessment, was bound to impose liability for payment of interest under sub-s. (6). But for some reason which cannot be ascertained from the record he did not impose that liability. It was only when in the course of audit this lacuna was pointed out, that the Income-tax Officer commenced proceeding under S. 35 of the Income-tax Act for rectification of the order of assessment. There was at the date of the original assessment an absolute obligation imposed upon the assessee to pay interest under s. 18-A(6), but by reason of the retrospective operation given to the fifth proviso added to sub-s. (6) by Act 25 of 1953, the Income-tax Officer was invested with the discretion to reduce or waive interest payable by the assessee, this power the Income-tax Officer must, in view of the retrospective amendment, be deemed in law to have possessed on the date on which the order of assessment was made in this case.

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

Mr. Sastri appearing on behalf of the assessee contended that this Court has laid down in T. Cajee v. U. Jormanik Siem and Anr(1) that where power is conferred upon an authority and it is made exercisable in the manner provided by subsidiary legislation, failure to enact such subsidiary legislation will not defeat the power: the power will be exercisable without the restrictions which may be, but are not imposed, and therefore once the power of the Income-tax Officer came into being that power became exercisable immediately without restrictions or limitations until the Central Government chose to frame rules defining those res- trictions. We do not think that the case cited by counsel for the assesee has any application. That was a case in which a District Council was constituted for the Jaintia Hill District under the Sixth Schedule to the Constitution. Under the Sixth Schedule, (1) [1961] 1 S.C.R. 750.

the District Council was empowered to make laws, inter alia, for administration of the District, and appointment or succession of chiefs or Headmen, but the District Council made no rules regulating the appointment and succession of chiefs and Headmen. It was held by this Court that the District Council being an administrative, and legislative body, it could, so long as no law was made, exercise its administrative powers to determine the appointment of Chiefs or Headmen. After the law was made, the administrative powers could be exercised subject to the law. The case has no application to the present case. The Sixth Schedule vested in the District Council a general administrative power which was capable of being restricted by law, but until so restricted the power was absolute. In the case before us, however, the discretion to reduce or waive interest can only be exercised in cases and under circumstances to be prescribed. There was no absolute power in which the Income-tax Officer was invested to reduce or waive interest; his power could be exercised only in prescribed cases within the limits of the authority conferred upon him. He could not reduce or waive interest except in cases and in circumstances prescribed. But once the rules are framed, they by reason of the retrospective operation of Act 25 of 1953 become operative as from the date on which the Act has become operative.

This Court in M. K. Venkatachalam I.T.O. and Another v. Bombay Dyeing and Manufacturing Company Ltd(1) held in dealing with a case arising under the second proviso to s. 18-A (5) (which was also inserted by Act 25 of 1953 with retrospective operation from April 1, 1952) that the Income-tax Officer has power under s. 35 of the Act to rectify a mistake in the assessment, even though the mistake was the result of a legal fiction arising from the retrospective operation given to the amending Act. in Venkatachalam's case(1) on October 9, 1952 the Income-tax Officer assessed the tax-payer for the assessment year 1952-53 and gave him credit for certain amount as representing interest on tax paid in advance under s. 18-A (5). Thereafter on May 24, 1953 the Indian Income-tax (Amendment) Act 25 of 1953 came into force which added a proviso to s. 18-A (5) that the assessee was entitled to interest not on the whole of the advance tax paid by him, but only on the difference between the payment made and the amount assessed. This amendment being retrospective as from April 1, 1952 the Income-tax Officer acting under s. 35 of the Act rectified the assessment order and directed that the assessee be given credit for a smaller amount by way of interest on tax paid (1) [1959] S.C.R. 703.

sup./65-14 in advance, and issued a notice of demand against the assessee for the balance remaining due by him. The assessee filed a petition in the High Court of Bombay praying for a writ prohibiting

the Commissioner of Income-tax and the Income-tax Officer from enforcing the rectified order and notice of demand. The High Court issued the writ prayed for, holding that S. 35 was not applicable to the case as the mistake could not be said to be apparent from the record and the question must be judged in the light of the law as it stood on the day when the order was passed. This Court reversed the order of the High Court and held that in view of the retrospective operation given to the newly inserted provision in S. 18-A(5) of the principal Act as from April 1, 1952 the order passed by the Income-tax Officer before the date on which the amending Act came into operation was incompatible with the provisions of that proviso and disclosed a mistake apparent from the record. The Court in that case relied upon the observations made by Lord Asquith of Bishopstone in East End Dwellings Co. Ltd. v. Finsbury Borough Council(1) "if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the "putative state of affairs had in fact existed, must inevitably have flowed from or accom- panied it." In Venkatachalam's case (2) by virtue of the retrospective operation of the amendment, the assessee was entitled to interest which was less than what had already been allowed to him in the course of assessment. On the date on which the order of assessment was made, the assessee was entitled to that amount. but by virtue of the amendment which was retrospective, his right was substantially restricted. It was held by this Court that in exercise of the powers under s. 35 of the Indian Income-tax Act on the application of the retrospective amendment, it must be held that, there was a mistake apparent on the face of the order. In the present case the position is reversed, but on that account the principle is not anytheless applicable. By virtue of the retrospective amendment in s. 18-A (6) the order which was made by the Income-tax Officer on the date of assessment and which was plainly inconsistent with the terms of the section as it then stood became one which he was competent to pass in exercise of his power. The Attorney-General contended that in any event there nothing to show that the income-tax officer had purported to exercise his discretion when he passed the order of assessment and (1) [1952] AC. 109,132.

(2) (1959) S.C.R. 703.

20 5 did not impose any liability for payment of interest under s. 18-A (6). That may be so. But the case of the assessee did fall within the terms of r. 48(1) and the Income-tax Officer must in law be bound to consider whether he was entitled to reduction or waiver of interest tinder the fifth proviso. The amendment and the rules which came into operation later must in view of the retrospective operation be deemed to be then extant, and the fact that the Income- tax Officer could not in making the assessment have adjusted his approach to the problem before him in the light of those provisions is irrelevant in considering the legality of his order, The order of the Income-tax Officer which did not take note of the law deemed to be in force must be regarded as defective. The matter was brought before the Commissioner of Income-tax and it is unfortunate that the Commissioner in considering the matter under s. 33-A assumed that the amending Act 25 of 1953 had no retrospective operation and rejected the claim of the assessee on the ground that at the (late when the order of assessment was made, Act 25 of 1953 had not come into operation, and that the Act became effective as from December 1953 when the rules were framed. In so holding, the Commissioner committed an error of law apparent on the face of the record. The High Court was therefore right in setting aside the order which was passed by the Commissioner without

considering the proviso to s. 1 A (6) which was clearly applicable to the case of the assessee and in the light of r. 48 which was enacted in pursuance of that proviso. The Attorney-General contended that the petition filed by the assesse did not expressly seek to plead the case which was ultimately made out by the High Court. It is .rue that the petition is somewhat vague in setting out the material particulars which have a bearing on the plea which appealed to the High Court. But it cannot be said, having regard specially to paragraph-6 cl. (iii) of the petition that in granting relief to the assessee a new case was made out by the High Court.

The appeal fails and Is dismissed with costs. There will be one hearing fee in Civil Appeals Nos. 1003 of 1961 and 1004 of 1963.

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

On the merits my learned brother has held that the High Court was right in quashing the order of the Income-tax Commissioner, Bombay, by which he confirmed the order of the First Income-tax Officer, C-II Ward,, Bombay, dated October 4, 1956 rectifying under s. 35 of the Income-tax Act, 1922 the regular assessment made by him on March 31, 1953. The sequence of the relevant events which have occurred is as follows. On September 17, 1947 the respondents filed under s. 18-A(2) an estimate of their income and on September 27, 1947 they made an advance payment of tax on its basis. On January 10, 1948 they filed a revised estimate in pursuance of which they made a further advance payment towards the tax on January 17, 1948. On August 23, 1950 they paid the tax in pursuance of the -provisional assessment made on July 22, 1950 under s. 23-B. All this was with respect to the assessment year 1948-49. While making the regular assessment on March 31, 1953 the Income-tax Officer omitted to charge penal interest as required by s. 1 8-A(6) of the Income-tax Act. It is not disputed that according to the law as it stood on the date on which the regular assessment was made the Income-tax Officer was bound to charge penal interest. By Act 25 of 1953 which came into force on May 24, 1953 the following proviso was added to s. 18-A(6) "Provided further that in such a case and under such circumstances as may be prescribed, the Income-tax Officer may reduce or waive the interest payable by the assessee."

In order to give effect to the proviso the Central Board of Revenue framed rule 42 and notified it on December 14, 1953. The rule read as follows :

> "The Income-tax Officer may reduce or waive the interest payable under section 18-A in the case and under the circumstances mentioned below, namely :
>
> (1) Where the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

(2) Where a person is under section 43 deemed to be an agent of another person and is assessed upon the latter's income.

(3) Where the assessee has income from an unregistered firm to which the provisions of clause (b) of subsection (5) of section 23 are applied.

(4) Where the 'Previous year' is the

financial year or any year ending near about the close of the financial year and large profits are made after the 15th of March, in circumstances which could not be foreseen. (5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 18-A(6) is justified."

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

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

Thereafter a notice demanding Rs. 14,929-10-0 was issued to the respondents. The respondents challenged this order before the Commissioner of Income-tax, Bombay. The main contention raised before him was that the omission to charge penal interest at the time of regular assessment cannot be considered to be a mistake apparent from the record in view of proviso to s. 18-A(6) and the Rules made thereunder and therefore the Income-tax Officer could not rectify the regular assessment by resort to s. 35 of the Act. This contention was not accepted by the Income-tax Commissioner. He, however, directed that in the circumstances of the case the respondents would be liable to pay penal interest only for the period between January 1, 1948 and June 13, 1950. Being dissatisfied with this decision the respondents moved the High Court for a writ under Art. 226 of the Constitution and succeeded in having the notice of demand quashed. The ground upon which the High Court -ranted relief to the respondents was that the Amending Act of 1953 which enacted the last proviso to s. 18-A(6) was made, retrospective from April 1, 1952; that, therefore, that proviso must be regarded as being on the statute book on the date on which the regular assessment was made, that, according to the -High Court, being the position the conclusion to be reached was that the Income-tax Officer had vested in him a discretion to reduce or waive the interest payable by the assessee notwithstanding the fact that the proviso was not there on the statute book when the assessment order was made. After referring to the earlier decision of the High Court in Shantilal Rayji v. M. C. Nair, IV Income-tax Officer, E. Ward, Bombay and anr.(1) the learned Judges observed "In our judgment in that case we referred to the decision of the Supreme Court in the State of Bombay v. Pandurang Vinayak(2) where their lordships of the Supreme Court pointed out the effect of a deeming provision being inserted in any statute and being given retrospective operation. We also referred to a passage from the judgment of Lord Asquith in East End DWellings Co. Ltd. v.

Finsbury Borough Council(1) in which the learned Law Lord very forcibly brought out the full effect of the legal fiction. The view which we ultimately took of the matter was that the Income-tax Officer had no jurisdiction to pass the order of rectification. By operation of tile deeming provision which was retrospective in it,,, operation, it was to be assumed and taken that on the date on which he made the assessment order he had jurisdiction and power to reduce or waive the amount of interest payable by the assessee. The Income-tax Officer not having done so, the only inference possible was that he had decided to waive the amount of interest and in those circumstances he bad no jurisdiction subsequently to rectify that order on the ground that there was an error on the face of the record."

There is no doubt that by making the proviso in question retrospective as from April 1, 1952 the legislature has created a fiction and because of that fiction we must proceed on the footing that the proviso was in existence when the regular assessment was made The learned Attorney General, however, contended before us that though that was the position the proviso could not be given effect to till the Central Board of Revenue prescribed the class of cases and circumstances in which an Income-tax authority could exercise the discretion conferred by the proviso. He pointed out that r. 48 framed by the Central Board of Revenue which prescribes these matters does not make it retrospective and, therefore, it should be (1) (1958) 34 I.T.R. 439.

(2) (1953) S.C.R. 773.

(3) (1952) A.C. 109.

deemed to be only prospective in its application. I find it difficult to accept this argument. The proviso was itself made retrospective as from April 1, 1952. Rule 48 as soon as it was framed was to be read alone with the proviso and as the proviso is retrospective the rule must also be deemed retrospective. It is a well accepted principle of construction of statutes that even if a provision of law may not have been expressly made retrospective it could be deemed to be so if the circumstances justify the inference that the legislature intended that it should be retrospective. Such an intention is evident in this case. Even though the proviso and the rule must be deemed to have been in force on April 1, 1952, 1 find it difficult to agree with the High Court that omission to charge penal interest at the time of making the regular assessment must be ascribed to the exercise of discretion by the Income-tax Officer. Let it not be forgotten that when he made that assessment, in point of fact, be passed no discretion and, therefore, he was bound by law to charge penal interest. His omission to do so must, therefore, be ascribed to an oversight and not to deliberateness. By an omission to do what he was bound by law to do the Income-tax Officer committed an error and that error appears on the face of the record. He was, therefore, competent to rectify under s.

35. Indeed, if instead of on March 31, 1953 the Income-tax Officer had made the regular assessment on March 31, 1952 could there have been any scope for the surmise that his omission to charge penal interest was attributable to the exercise of any discretion ? At any rate without further material we cannot even assume that while making the regular assessment on March 31, 1953 the Income-tax Officer, upon an erroneous view of law, came to the conclusion that he had discretion under s. 18-A(6) to reduce or waive any interest and that, therefore, he purported to exercise that discretion.

At least prima facie the Income-tax Officer in omitting to charge penal interest made a mistake. This would appear to be home out by the fact that on October 14, 1956 when he made good the omission by resorting to the power conferred by s. 35 he accepted the position that what he did earlier was through mistake. In the circumstances, therefore, agreeing, with the Income-tax Commissioner but disagreeing with the High Court, I hold that the Income.-tax Officer was competent to rectify the mistake under s. 35. I would, therefore, allow the appeals and quash the order of the High Court but in the circumstances of the case would make no order as to costs.

Appeals dismissed.