Trust proposed that the ownership of the market should vest in the Trust the final terms agreed between the parties in accordance with the provisions of section 54-A left the ownership with Government. We have come to this conclusion without reference to the admission of the plaintiff contained in para 22 of the indenture (Ex. D. 4) quoted above. It is, therefore, not necessary for us to consider the question raised by the learned Attorney-General that the plaintiff was bound by that admission or whether that admission is vitiated by any pressure of circumstances or duress as pleaded by the plaintiff. Certainly that admission is a piece of evidence which could be considered on its merits even apart from the question of estoppel which had not been specifically pleaded or formed the subject matter of a separate issue.

In view of our finding that the market, as also the land on which it stands, is the property of Government, the conclusion follows that the operative provisions of the Control Act do not apply to the premises in question. That being so, it must be held that there is no merit in this appeal. It is accordingly dismissed with costs.

APPELLATE CIVIL

Before Bhandari, C. J., and Khosla and Kapur, JJ.

SARDAR KAPUR SINGH,—*Petitioner*

versus

THE UNION OF INDIA,—*Respondent*

Supreme Court Appeal No. 2 of 1956.

1957

Jan., 4th

Constitution of India, Articles 133 and 226—High Court declining to issue a writ under Article 226 of the Constitution—Such order, whether can be regarded as a judgment, decree or final order within the meaning of Article 133 of the Constitution—Proceedings under Article 226—Nature of—Whether civil proceedings.

The following two questions were referred to a Full Bench by Hon'ble the Chief Justice and Khosla, JJ.—

(1) Whether an order passed by this Court declining to issue a writ under Article 226 of the Constitution can be regarded as a judgment, decree or final order within the meaning of Article 133; and

(2) Whether the proceeding in which such an order is passed can be regarded as a civil proceeding within the meaning of the said Article ?

Held, (1) that whether the proceeding in which the Court declines to issue a writ under Article 226 of the Constitution of India can be regarded as a civil proceeding or not within the meaning of Article 133, cannot be answered by saying just yes or no. It will depend on the facts and circumstances of each case and keeping them in view it has to be determined in each case. But what a civil proceeding is may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right. It covers every step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked;

(2) that in order that a decision should fall within the definition of the word "judgment" or "final order" (1) it must finally decide the rights of the parties and the word "judgment" means a final judgment and not an interlocutory judgment, and by which right to the relief claimed is decided with regard to all matters in issue, and (2) an order is final if it finally disposes of the rights of the parties and if it does not, it is not final even though it may decide a vital issue in the case.

Case referred by Hon'ble the Chief Justice, Mr. A. N. Bhandari and Hon'ble Mr. Justice G. D. Khosla to a larger Bench.

Petition under Sections 109 and 110 of the Civil Procedure Code and Articles 132 and 133 of the Constitution of India for grant of certificate for leave to appeal to the Supreme Court of India, against the Judgment of Hon'ble the Chief Justice and Hon'ble Mr. Justice G. D. Khosla of

the Punjab High Court, Chandigarh, dated the 7th October, 1955, in case Civil Writ No. 322 of 1953—S. Kapur Singh v. *Union of India.*

B. S. CHAWLA, for Petitioner.

S. M. SIKRI, Advocate-General, for Respondent.

ORDER

BHANDARI, C. J.—S. Kapur Singh, a member of the Indian Civil Service, was removed from the service of the State by virtue of an order passed by the President of India and his petition under Article 226 of the Constitution was dismissed by this Court on the ground that the order of removal was valid and operative in the eye of law. He has now presented an application under section 109 and 110 of the Code of Civil Procedure and Articles 132 and 133 of the Constitution of India in which he prays that he may be permitted to prefer an appeal to the Supreme Court of India. Bhandari, C. J.

Article 133 of the Constitution provides that 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 conditions mentioned in the body of the Article are satisfied.

Two questions at once arise for decision, namely—

(1) whether an order passed by this Court declining to issue a writ under Article 226 of the Constitution can be regarded as a judgment, decree or final order within the meaning of Article 133; and

(2) whether the proceeding in which such an order is passed can be regarded as a civil proceeding within the meaning of the said Article?

The first of these questions was referred to a Full Bench of this Court in Civil Miscellaneous No. 194-C, of 1955. We are of the opinion that the second question is equally important and should also be referred to and decided by a Full Bench. Ordered accordingly.

JUDGMENT.

Kapur, J. KAPUR, J.—In these two cases (Civil Miscellaneous No. 194-C of 1955 and Supreme Court Appeal No. 2 of 1956) certain questions of law have been referred to a Full Bench by two different Division Benches. In Civil Miscellaneous No. 194-C of 1955 the following question has been referred:—

> "When the High Court refuses to issue a writ under Article 226 of the Constitution, does the order of the High Court amount to a judgment or a final order within the meaning of Article 133 of the Constitution and does an appeal lie to the Supreme Court under Article 133 (1)(a) or 133 (1)(b) provided the subject matter of the appeal is worth Rs. 20,000 or more ?

In the Supreme Court Appeal No. 2 of 1956, the two questions which have been referred are—

(1) Whether an order passed by this Court declining to issue a writ under Article 226 of the Constitution can be regarded as a judgment, decree or final order within the meaning of Article 133; and

(2) whether the proceeding in which such an order is passed can be regarded as a civil proceeding within the meaning of the said Article?

The former case arises out of proceedings before the Deputy Custodian-General before whom the disputants were Amar Kaur, widow of Harnam Singh, and

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Parkash Kaur, widow of pre-deceased son of Harnam Singh. In the Jamabandi of Chak No. 95-12L in Tehsil and District Montgomery (now West Pakistan) both these widows were recorded as proprietors of land in equal shares. After the partition Amar Kaur made an application that the entire land should be allotted to her on the ground that the widow of a pre-deceased son was not entitled to succeed equally with the widow of the last holder and this application was allowed. A revision was taken to the Additional Custodian who set aside the order and restored the allotment in the names of both the widows. Amar Kaur took a revision to the Custodian-General who gave no decision and ordered that the entries in the Jamabandi of Montgomery should be followed and directed the parties to have their dispute settled by the Civil Court. The dispute really was whether the parties were governed by Hindu Law or by custom.

Against this order an application was made to this Court under Article 226 of the Constitution of India praying for a writ of certiorari for quashing the orders passed by the Deputy Custodian-General and the Additional Custodian and for restoring the order of the Deputy Custodian, i.e., for the allotment of the land to the petitioner. This petition was dismissed *in limine* by a Bench of this Court consisting of Bhandari, C.J. and Dulat, J., and an application has been made for leave to appeal to the Supreme Court under Article 133(1) of the Constitution of India.

I must here mention that no rights were determined by the Custodian-General. All that he did was to allow the allotment to be made in conformity with the entries in the Jamabandis from Montgomery in West Pakistan and followed the usual rule of the Rehabilitation Department that lands are to be allotted in accordance with the entries in the Jamabandis, and he has directed the parties to have their rights

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determined by a Civil Court. The only question that has been referred for determination by the Full Bench in this case is whether the order of this Court dismissing the application in limine and just writing 'Dismissed' amounts to a judgment or a final order within the meaning of Article 133(1) of the Constitution of India.

In Supreme Court Appeal No. 2 of 1956, the circumstances in which the matter was brought to this Court may shortly be given. Kapur Singh was a member of the Indian Civil Service who was, according to the order of reference, dismissed from service by an order of the President of India, but before the order of dismissal was passed an enquiry was held under Act 37 of 1850 by Weston, C.J., of this Court who made his report on the 14th of May, 1951. The petitioner was then called upon to show cause why he should not be dismissed from service and after he made a representation the order of dismissal was passed by the President of India. It appears that in his representation he complained that he had not been afforded a reasonable opportunity of being heard and he requested that he be permitted to call certain witnesses whom he wanted to produce before the Commissioner but who were not allowed to be produced. The President did not allow the enquiry to be reopened, and after ascertaining the views of the Union Public Service Commission passed an order of dismissal on the 27th July, 1953. It was this order that was challenged by Kapur Singh in his petition under Article 226 of the Constitution. His complaint was that the constitutional guarantee given to him under Articles 311 and 314 had been violated. This petition was heard by a Bench consisting of Bhandari, C.J. and Khosla, J., and they dismissed the application after discussing the various points which were raised before them. It is against this decision of this Court that Kapur Singh wants to appeal to

the Supreme Court under Article 133(1) of the Constitution of India, and two questions have been raised (1) whether the decision given by this Court amounts to a judgment or final order, and (2) whether the proceedings in which the decision was given can be called civil proceedings within the meaning of that phrase as used in the Article.

The first question that I propose to take up is whether the proceedings were civil proceedings. Appeals to the Supreme Court are dealt with in the Constitution of India in Chapter IV of Part V in Articles 132 to 136. Article 132 deals with the appellate jurisdiction of the Supreme Court in appeals from High Courts in certain cases. It provides—

> "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 proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

* * * * *

* * * * *

Article 133(1) deals with appeals from High Courts in regard to civil matters and is as follows:—

> "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—

* * * * *

* * * * *

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Article 134(1) gives the jurisdiction of the Supreme Court in regard to criminal matters and provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court.....Article 135 confers on the Supreme Court the powers of the Federal Court under the existing law, and Article 136 deals with special leave to appeal by the Supreme Court and is as under—

> "Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> * * * * *
> * * * * *

It will be noticed that in Article 132 the appeal is provided against a decision of the High Court in civil, criminal or other proceedings. In Article 133 the words used are "civil proceeding" and in Article 134 "criminal proceeding" and in Article 135 the words used are "with respect to any matter to which the provisions of Article 133 or Article 134 do not apply" and Article 136 uses the words "in any cause or matter passed or made by any Court or tribunal in the territory of India". In other words by this Article the sovereign prerogative of the whole Union in regard to judicial matters is conferred on the Supreme Court. This takes the place of section 112 of the Civil Procedure Code which gave unlimited jurisdiction to the King in Council in regard to appeals other than any matter of criminal or admiralty jurisdiction or appeals from orders and decrees of Prize Courts. The powers of the Supreme Court in Article 136 are much wider than those given in section 112

of the Civil Procedure Code which has now been repealed. In Kapur Singh's case the application under Article 226 in this Court was directed against the proceedings taken by Weston, C.J., under Act 37 of 1850 and the order which was passed by the President of India including his order refusing to reopen the proceedings, and it is contended by the State that the decision given by this Court in Kapur Singh's case is not a decision in civil proceedings but would fall under the words "other proceeding" as given in Article 132 of the Constitution of India.

In Articles 132, 133 and 134 the word used is "proceeding", whereas in Article 136 the words used are "any cause or matter", although in the marginal note to Article 132 the words used are "in certain cases" and in the marginal note to Articles 133 and 134 the words used are "in regard to civil matters" and "in regard to criminal matters" respectively. The use of the word "proceeding" instead of the words "cause or matter" has in my opinion to be given the effect to. But the learned Advocate-General contended that there is really no difference between the two, i. e., between the words "cause or matter" and the word "proceeding" as used in Articles 132, 133 and 134.

The contention raised on behalf of the State was that in order to determine whether the proceeding before the High Court was a civil proceeding, criminal proceeding or any other proceeding, the Court must see the nature of the cause or matter before the tribunal against which an application is directed and it must decide according to the nature of the cause or matter. The learned Advocate-General referred to section 31(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, (15 and 16 Geo. 5, Chapter 49), according to which no appeal shall lie except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any

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criminal cause or matter. As to what is a criminal cause or matter within the meaning of this section has been decided in many English cases, and it was held that it must involve the consideration of some charge of crime, i.e., of an offence against the public law and that charge must have been, or be about to be, preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence [*Re Clifford and O' Sullivan* (1)], It was also contended that the proceeding is civil if the cause or matter out of which it arises if carried to its conclusion might result in an order finally determining civil rights of the parties to the dispute, and proceeding is criminal if cause or matter is one which if carried to its conclusion might result in imprisonment or fine or the imposition of punishment for some offence, and when it is neither civil nor criminal, it would be any other proceeding. A reference was also made to Article 374(2) by virtue of which all suits, appeals and proceedings civil or criminal pending in the Federal Court at the commencement of this Constitution "shall stand removed to the Supreme Court", and the absence of the words "other proceedings" in this Article was emphasised.

The learned Advocate-General referred to *R.* v. *Fletcher* (2). In that case a rule for certiorari was obtained in the Queen's Bench Division to bring up a summary conviction by justices for the purpose of quashing it on the ground of want of jurisdiction and when the decision of the Queen's Bench Division was sought to be taken to the Court of Appeal, it was held that the judgment of the High Court was not a criminal matter and, therefore, no appeal lay. At page 45 it was observed by Mellish, L.J.—

> "It is clearly a criminal matter, it is a proceeding in the Queen's Bench Division,

(1) (1921) 2 A.C 570 at p. 580.
(2) (1876) 2 Q.B.D. 43.

although not commenced there, and, therefore, it is a proceeding in a criminal matter in the High Court".

No doubt that does lend support to the submission that in order to determine whether an appeal would lie against the decision of the High Court, it has to be determined as to the cause or matter against which the proceedings in the High Court were directed. But this case itself draws a distinction between what is a "cause or matter" and what is a "proceeding".

Reliance was next placed on *Amand* v. *Secretary of State for Home Affairs* (1), in which the facts were that a Netherlands subject residing in England was called up for service in the Netherlands Army and he deserted. He was arrested as a deserter under the Army Act and was handed over to the Netherlands Army. He applied for a writ of *habeas corpus* on the ground that his arrest as a deserter was unlawful. This writ was refused and he took an appeal, and a preliminary objection was taken that the appeal being in a criminal cause or matter the Court had no jurisdiction to entertain it, and it was held that because there were proceedings against the appellant in which he was or might be in danger of being sentenced to punishment, the case related to a criminal cause or matter. This judgment holds that in order that an appeal may be in a criminal cause or matter it must involve the consideration of some charge of crime and an offence is something which may put the applicant in danger of some form of punishment. This case shows that a writ of *habeas corpus* is a procedural writ and the application for it is merely a step in the proceedings in the matter begun before the Magistrate.

(1) (1942) 2 A.E.R. 381.

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The Advocate-General laid stress on the observations of Lord Wright at page 387, where it is said—

> "The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced in order to exclude any limited definition of the word 'cause'."

Reference was then made to *R.* v. *Justices of the Appeals Committee of the County of London Quarter Sessions* (1). An excise officer in that case exhibited three informations before a Court of summary jurisdiction charging an offence against the licensing laws and claiming the penalty of $ 50. The informations were dismissed and the excise officer appealed. The appeal was dismissed by the Divisional Court, and an appeal was taken to the Court of Appeal. On a preliminary objection it was held that the order of the Divisional Court was made in a criminal cause or matter because if the cause or matter were carried to its conclusion it might result in the imposition of the punishment or fine and, therefore, no appeal was competent. This was a case of Prohibition. Reference was made in this case to *In re Hausmann* (2), in which it was held that an information in the King's Bench Division to recover penalties for smuggling is not a criminal proceeding and that an appeal would lie to the Court of Appeal. Reference was also made to a decision of the Court of Appeal in Northern Ireland in *Rex (Sherry)* v. *County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (3), in which it was held that the proceedings before justices to recover treble duty by way of penalty for knowingly harbouring uncustomed goods were not

(1) (1946) 1 K.B. 176.
(2) (1909) 3 Cr. App. R. 3.
(3) (1935) N.I. 211.

proceedings in "a criminal cause or matter" so as to oust the jurisdiction of the Court of Appeal. At page 233 of that report Andrews, C.J., observed—

> "In my opinion it would be an absurd conclusion at which to arrive, and one which, I conceive, would be at variance with the true view of our law, that when a person is charged with an offence under the Customs Acts, the character of the proceedings, with all that it involves, should be determined by the persons arbitrarily selected either by the Attorney-General or by a Customs Official. It would be doubly absurd if the smaller offences which would naturally be brought before the justices were branded as criminal whilst the more serious cases tried in the High Court were regarded as of a purely civil character."

It appears that in a case from Southern Ireland a different decision was given in *The State* v. *Judge Fawsitt* (1), in which the proceeding under discussion was an information laid before the District Judge to recover a penalty for attempting to export certain articles for which an export licence had not been obtained, and Murnaghan, J., differed from the reasoning of Andrews, C.J., in the case which has been referred to above, and observed: —

> "The reasoning of Andrews, C.J., in Northern Ireland largely rests upon the absurdity of proceedings before justices being a crime, and proceedings for a similar matter in the High Court not being a crime. If the form of proceeding is the test of criminal or civil proceedings, I personally see no

(1) (1945) I.R. 183, 193.

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absurdity in one proceeding being civil and the other being criminal".

The Advocate-General then referred to *Seaman* v. *Burley* (1), which was a special case stated by justices on an application to enforce payment of a poor-rate by warrant of distress, and it was held that this is a judgment in a criminal cause or matter inasmuch as the proceedings may end in imprisonment of the person in default. Lord Esher M. R. said at page 346—

> "It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause or matter."

It was also observed that "the question depends upon whether the origin of the proceeding, i.e., the matter complained of, is in its nature criminal or not. In each case the thing complained of is the same, namely, the assault, but there is or is not an appeal to this Court according as the procedure to which recourse is had is civil or criminal." It will be noticed that in this case the question for determination was whether the proceedings which were going on were a criminal cause or matter and that was to be determined according as the procedure adopted is civil or criminal and, therefore, distinction is made between the word "proceeding" and the words "cause or matter."

Similar test was laid down in the case of a writ of prohibition *In re Clifford and* 0' *Sullivan* (2), where a writ of prohibition was applied for in the Chancery Division against the Military Court of Inquiry to prohibit them from further proceeding with the trial or from carrying into execution any judgment

(1) (1896) 2 Q.B. 344.
(2) (1921) 2 A.C. 570.

against them. The prohibition was refused by Powell, J., and the Court of Appeal in Ireland dismissed the appeal from his order as being incompetent upon the ground that it was an order made in a criminal cause or matter. The House of Lords held that it was not, that is the order of Powell, J., was not made in a criminal cause or matter because the proceedings before the Military Court were in no sense criminal proceedings and, therefore, an appeal was competent.

Reliance was next placed on a case of mandamus *Ex Parte Schofied* (1), where the Queen's Bench Division refused to grant *mandamus* to compel a stipendiary Magistrate to state a case for the opinion of the Court under section 96 of the Public Health Act for abatement of nuisance. This decision was held to have been given in a criminal cause or matter. At page 430 Lord Esher M. R. referred to his previous judgment in *Ex Parte Woodhall* (2), and quoted with approval the following passage from page 836—

> "I think that the clause of section 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises."

The Master of the Rolls then observed:—

> "We are, therefore, asked to compel him (the Magistrate) to take a step in a proceeding in a criminal cause or matter which would have the effect of causing his decision to be reviewed."

It will be noticed that the word "proceeding" is used in contradistinction to the words "cause or matter", and

(1) (1891) 2 Q.B. 428.
(2) 20 Q.B.D. 832, 836.

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his Lordship made it clear that the statement of the case would be a step in a proceeding in a criminal cause or matter but it is not the criminal cause or matter itself. The same seems to be the effect of the passage quoted from *Ex Parte Woodhall* (1).

Counsel then referred to *R.* v. *Tyler,* (2). In that case a Magistrate refused to issue a summons under section 27 of the Companies Act, against a company to recover penalties for default in forwarding a list of its members to the Registrar of Joint-Stock Companies. The Queen's Bench Division refused to issue a mandamus directing him to hear and determine the application for a summons, and it was held that the application to the Magistrate for a summons against the company was a criminal proceeding and, therefore, the judgment of the Queen's Bench Division was a judgment in a criminal cause or matter.

On the basis of these English cases the Advocate-General submitted that in order to determine what is the nature of the proceedings against which an appeal is sought to be taken, this Court must see the nature of the proceedings against which an application under Article 226 is made. If the order of this Court is directed against a proceeding which is criminal in character in that if it is carried to its conclusion it may end in imprisonment or punishment for an offence, then the proceeding in the High Court must be taken to be a criminal proceeding and if the effect of the order made by this Court will be in regard to proceedings which relate to determination of individual rights of redress of individual wrongs, then it will be civil proceeding, but if the proceedings are neither one nor the other, they will be the other proceedings within the meaning of Article 132 and the Article applicable would not be Article 133 but 132.

(1) 20 Q.B.D. 832, 836.
(2) (1891) 20 Q.B.D. 588.

But all these cases show that cause or matter is not the same thing as proceeding. Proceeding may be in a cause or matter but it cannot be said that they are interchangeable terms.

According to Black's Judicial Dictionary at page 482 the words "criminal proceeding" are defined as "one instituted or conducted either for preventing the commission of crime or fixing the punishment for crime already committed and punishing the offender as distinguished from a civil proceeding which is for the redress of a private injury", and according to Stroud's Judicial Dictionary, civil proceeding is a process for recovery of individual right or redress of individual wrong; inclusive, in its proper legal sense, of suits by the Crown. [See *Bradlaugh* v. *Clarke*, (1), which is also reported in 8 A.C. 354]. In *Ex Parte Caucasian Trading Corporation Limited* (2), an application to enforce an award in the same manner as a judgment or order to the same effect was held to be a civil proceeding. It was sought to be argued in this case that the application to enforce the award must be considered as a mere continuation of the arbitration and though in one sense a civil proceeding in the High Court, it was not such a civil proceeding within the meaning of section 1 of the Bankruptcy Act, 1890. *Rigby*, L.J., did not accept this contention and said at page 372 —

> "The application for leave to enforce the award is not a matter which takes place in the arbitration. It is no more a continuation of the arbitration than an action on the award would be. Such an action would obviously be a proceeding entirely outside the arbitration.....":

(1) 52 L.J. Q.B. 505.
(2) (1896) 1 Q.B. 368.

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Lopes L.J., said at page 371—

> "It is, however, argued for the debtor that the writ was not issued 'in a civil proceeding in the High Court' within the meaning of section 1 of the Bankruptcy Act, 1890. I think the expression 'civil proceeding in the High Court', as used in that section, must be taken to include everything which according to the ordinary meaning of the words, can properly be called such a proceeding".

Quo Warranto is now under the English law a civil proceeding.

The word "proceeding" has also been interpreted in some judgments in England. In *Pryor* v. *The City Offices Company* (1), the phrase "in any proceeding" was construed as a general phrase meant to cover every step in an action and is equivalent to the word "action". This was so construed by Brett M. R. at page 508. Cotton L.J., at page 510 construed these words to mean "in any action or suit". In R.S.C. Order 64, Rule 13, "proceeding" is used as meaning "a step in an action, i.e., semble, a step 'towards' and not 'after' judgment" [*Houlston* v. *Woodward* (2)].

The words "any other proceeding" were defined in *Spincer* v. *Watts,* (3), in connection with Order 26, Rule 1, of the Rules of Supreme Court. It means any proceeding with a view to continuing the action, i.e., a step forward, and not one backward. A charge to a Grand Jury has been held to come within the description of proceedings in a Court of Justice [See *Rex.* v. *Editor and Publishers of the "Evening News"* (4)], "Any other proceedings" in Order 65, Rule 27

(1) (1883) 10 Q.B.D. 504.
(2) Law Notes, 1885 P. 15.
(3) 23 Q.B.D. 350.
(4) 41 T.L.R. 291.

were held to include the trial of the action and this expression was held not to be limited to interlocutory proceedings [See *A.G. Spalding* v. *A.W. Gamage*, Limited (1)].

In 9th Volume of Halsbury's Laws of England, Second Edition, it is stated at page 798, that the Rules of the Supreme Court as to appeals to the Court of Appeal apply to all civil proceedings on the Crown side, including mandamus. In *R.* v. *Westminster Assessment Committee* (2), the dispute was as to the rateable valuation of premises as between an owner and the Assessment Committee of Westminister. The owner applied for a prerogative writ of mandamus but the writ was refused and an appeal was sought to be taken to the Court of Appeal, and it was held that an application for a prerogative writ of mandamus is a civil proceeding and is consequently an action within the definition of that word in section 100 of the Judicature Act.

At page 875 of the 9th Volume of the Halsbury's Laws of England (2nd Edition) it is stated that an appeal to the Court of appeal and thence to the House of Lords lies from a decision of the King's Bench Division granting or refusing the writ of certiorari except in cases which are of a criminal character.

Reference was then made to some of the American cases. In *the matter of Tom Tong* (3), Civil proceedings were defined to mean proceedings to enforce civil rights, and criminal proceedings as proceedings for the punishment of crimes, but according to the law in America writ of *habeas corpus* obtained to enquire into the legality of a detention is not a proceeding in that prosecution but is a new suit to enforce a civil right and, therefore, in a claim that the

(1) (1914) 2 Ch. D. 405.
(2) (1917) 2 K.B. 215.
(3) 108 U.S. 556.

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Constitution and a Treaty of the United States give to a person the right to his liberty, notwithstanding the charge that has been made against him and he has obtained a judicial process to enforce that right, the proceeding on his part is a civil proceeding even though the object is to be released from custody under a criminal prosecution. In *Farnsworth* v. *The Territory of Montana*, (1), it was held that a writ of prohibition is a civil remedy. At page 113 Mr. Justice Balatchford said:—

> "A writ of prohibition is a civil remedy, given in a civil action, as much as a writ of *habeas corpus*, which this Court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution".

"A civil proceeding" is discussed at page 28 in Ferris on Extraordinary Legal Remedies. It is there stated that *habeas corpus* is a civil, separate proceeding to enforce a civil right, the right to personal liberty, whether the restraint be by virtue of criminal or civil process. It is also stated that a question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried. At page 219 in the same book mandamus is stated to be a civil remedy for the protection of civil rights even though the occasion for its use may spring from a criminal action.

In the American publication "Words and Phrases" at page 83 the term "proceeding" is defined:—

> "The term "proceeding" is a very comprehensive term, and, generally speaking, means a prescribed course of action for enforcing

(1) 129 U.S. 104.

> a legal right, and hence it necessarily embraces the requisite steps by which judicial action is invoked. (*Hyattsville Building Ass'n* v. *Bouic* (1)."

It is an instrument whereby the party injured obtains a redress for wrongs committed against him either in respect to his personal contracts, his person, or his property. Proceeding in enforcement of a civil right is a prescribed mode of action for carrying into effect a legal right. In common parlance and in legal acceptation 'proceeding' imply action, procedure, prosecution "proceeding", as used in (the Amercian) Constitution, providing that Supreme Court shall have jurisdiction to issue writs of error to the superior Court and to determine all matters in error in the judgments and "proceedings" of such Court, includes "proceedings" not strictly of common-law origin (American Constitution art. 4, section 12 para 1. *Electrical Research Products* v. *Vitaphone Corporation* (2). At page 89 in the same book (Words and Phrases) the term "proceedings" is defined to mean all the steps or measures adopted in the prosecution or defence of an action, but none of the definitions given on that page or in the following pages seems to equate the word "proceeding" with the words "cause or matter". The common factor in all these definitions is that the term "proceeding" is generally applicable to any step taken by a party in the progress of an action and that anything done from the commencement to its termination is a "proceeding".

Coming now to the Indian decisions, in a recent judgment of the Supreme Court *A. Thangal Kunju Musaliar* v. *M. Venkatachalam Potti, Authorised Official and an other* (3), assessee filed a writ of prohibition in the High Court of Travancore-Cochin against the Indian Income-tax Investigation Commission and

(1) 44 App. D.C. 408, 413.
(2) 171 A. 738, 20 Del. Ch. 417.
(3) 1956 S.C.A. 259.

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their agent at Quilon and the High Court issued the writ. An appeal was taken to the Supreme Court under Article 133 of the Constitution and although the Attorney General was appearing for the Union of India, no objection seems to have been taken that they were not civil proceedings and, therefore, did not fall within Article 133(1) of the Constitution of India. It is true that no decision was given in this matter, but if the objection as to civil proceedings or any other proceedings had any substance, it would have been taken before the Supreme Court. In an old Bengal case *The Justices of the Peace for the Town of Calcutta* v. *The Oriental Gas Company, Limited* (1), a mandamus was issued upon the application of the Oriental Gas Company against the Justices of the Peace commanding them to make compensation to the Gas Company for damages occasioned to them by the drainage-works and also commanding them to make a reference to a Judge of the Small Cause Court to ascertain the same. An appeal was taken against the order passed by Mr. Justice Phear and an objection was taken that this was not a judgment, and it was held that it was not a judgment and also that the proceeding by way of madamus is a proceeding in a civil case.

In *Tobacco Manufacturers* v. *The State* (2), it was held that a decision given by the High Court pronouncing in regard to the question of law referred to it by Revenue authorities under the Sales Tax Act, is not a judgment but merely an opinion and also that the proceedings in Sales Tax cases are not civil proceedings within the meaning of Article 133 of the Constitution. Reliance was placed on *Raleigh Investment Co. Ltd.* v. *The Governor-General in Council* (3), where the Privy Council held that the Income-Tax Act contained machinery which enabled an assessee to effectively raise questions as to provisions of the Act being *ultra*

(1) 17 Sutherland Weekly Reporter 364.
(2) I.L.R. 30 Pat. 174.
(3) 74 Ind. App. 50.

vires and he could not institute a civil suit for the purpose. Reference was also made to the Supreme Court judgment in *Pritam Singh* v. *The State* (1), and *to the Bharat Bank, Ltd.*, v. *The Employees of the Bharat Bank* (2). But Shearer, J., was of the opinion that they were civil proceedings.

Counsel then referred to another judgment of the Patna High Court in *Gopeshwar Prashad Sahi* v. *The State of Bihar and others* (3). That case related to an impartible estate in Bihar under the management of the Court of Wards. In a proceeding which arose out of an application under Article 226 for a writ of mandamus upon the Board of Revenue to withdraw from the management of the estate it was contended that certain provisions of the Court of Wards Act as also of the Indian Majority Act had become void as a result of the Constitution. It was also contended that the petitioner had no reversionary or immediate interest in the impartible estate. It was held that the proceeding in which the above contentions were raised and determined was a civil proceeding which fell under Article 133(1). Reuben, J., held that the capacity in which the State is empowered to perform the actions challenged will not determine the nature of the proceeding in which that action is challenged and the words "a civil proceeding" in Article 133 should be interpreted in their natural sense as meaning a proceeding of a civil nature and that it could not be interpreted in a narrow sense.

In a still later Patna case *Allen Berry and Co.*, v. *Income-tax Officer, Patna* (4), the assessee was taxed to income-tax exceeding Rs. 20,000. Against that order an application was made under Articles 226 and 227 of the Constitution which was dismissed, and in an

(1) 1950 S.C.R. 453.
(2) 1950 S.C.R. 459.
(3) A.I.R. 1951 Pat. 626.
(4) A.I.R. 1956 Pat. 175.

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application for leave to appeal to the Supreme Court, it was held that the order was a final order within the meaning of Article 133(1), but the nature of the proceedings started on the petition being under the machinery of Income-tax Act under which there was no right of civil suit, the proceedings were not civil proceedings within the meaning of Article 133 but were revenue proceedings. The test there seems to be that if a suit could have been brought, it would have been a civil proceeding and as a suit was not possible it was not a civil proceeding. At page 178 S. K. Das, C.J., said:—

> "In cases before us, the nature of the proceeding was that it called into question certain assessment orders made by the Income-tax authorities. The proceeding was not a civil proceeding as there was no right of suit, and I do not think it can be said to be a civil proceeding within the meaning of Article 133 of the Constitution".

He was also of the opinion that a writ application was not necessarily a civil proceeding. It may be a civil proceeding or a criminal proceeding or other proceeding according to the nature of the application and the questions raised and decided in the proceeding, and if the petitioners had proceeded under the machinery of the Income-tax Act, the proceeding would not have been anything but a revenue proceeding.

In the case just quoted above reference was made to a judgment of the Rajasthan Court in *Nahar Singh* v. *State of Rajasthan* (1), where it was held that the question whether a proceeding under Article 226 is a civil proceeding or not depends upon the nature of the proceeding. In that case an application had been made challenging the validity of the Rajasthan Land Reforms

(1) A.I.R. 1955 Raj. 56.

and Resumption of Jagirs Act, the proceedings were held to be civil proceedings. One of the reasons given was that according to the rules of the Court they fell in the category of civil proceedings. It is obvious that there the challenge was in regard to the constitutionality or otherwise of the Rajasthan Land Reforms and Resumption of Jagirs Act, and any determination of that question would certainly be a process for redress of individual wrong and the application in the High Court was a step taken in pursuit of enforcing the rights of the petitioner.

Another case relied upon is a judgment of the Hyderabad High Court in *Ramchandara Reddy* v. *Shankaramma* (1). In that case leave to appeal to the Supreme Court was sought against an order of the High Court under Articles 132 and 133 of the Constitution and the statute which was assailed was the Hyderabad (Abolition of Jagirs) Regulation, and it was held that the question whether it was a civil proceeding or not should be decided, taking into view the nature of the proceedings, and because the proceedings in the High Court were not of a criminal nature and the question involved was as to who should get the income of the *jagir,* the proceedings were of civil nature. Reference was also made to section 15 of the Supreme Court of Judicature Act, 1884 in which proceedings in '*quo warranto*' were deemed to be civil proceedings, and it was the principle of this section which was applied for the purpose of holding that the proceedings in the Court were civil proceedings within the meaning of Article 133 of the Constitution.

The different Articles of the Constitution themselves show that the word 'proceeding' has been used as distinct from 'cause or matter'. No doubt in England when it is to be decided whether an appeal lies to the Court of Appeal, the question to be seen is what

(1) A.I.R. 1953 Hyd. 131.

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is the cause or matter and if the remedy sought in the High Court is directed against a matter which if carried to its conclusion will end in imprisonment or punishment for an offence, then it is a criminal cause or matter, but if the cause or matter out of which it arose would, if carried to its conclusion, result in an order finally determining civil rights of parties, then it is a civil cause or matter. But the English cases themselves have drawn a distinction between the word 'proceeding' and the words 'cause or matter'. Proceeding may be a step in a cause or matter itself. English Courts have not gone to the extent of saying that the word 'proceeding' can be equated to 'cause or matter'. I have already discussed the various English cases and have shown the distinction which has been drawn by English Courts and it is not necessary to reiterate the distinction.

Mr. Nayer referred to the *Province of Bombay* v. *Khushaldas S. Advani,* (1), where the Government of Bombay issued an order requisitioning the flat which the petitioner one Khushaldas S. Advani had taken on lease from one Ismail and it was allotted by the Government to one Mrs. C. Dayaram who was like the petitioner Advani a refugee from Sind. The petitioner filed a petition for a writ of certiorari and for an order under section 45 of the Specific Relief Act which were granted by Bhagwati, J., but the appeal Court confirmed the order as regards the issue of writ of certiorari against the Province of Bombay but cancelled it as regards the other parties. Mahajan, J., as he then was, said at page 236—

> "The expression 'sue' means 'the enforcement of a claim or a civil right by means of legal proceedings'. When a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy fall

(1) A.I.R. 1950 S.C. 222.

within the expression 'sue'. Any remedy that can be taken to vindicate the right is included within the expression. A writ of *certiorari*, therefore, falls within the expression 'sue' used in section 176, Government of India Act, 1935, and the remedy therefore, is within the express terms of the statute".

The question whether a proceeding is a civil proceeding or not came up for decision of this Court in *Kanshi Ram* v. *Delhi Improvement Trust* (1). My learned brethren Khosla and Falshaw, JJ., held following *Gopeshwar Prasad Sahi* v. *The State of Bihar and others* (2), that an application for a writ under Article 226 must be considered to be a civil proceeding provided the application arises out of a "matter" which is a civil proceeding.

It appears that in every case one has to see against what wrong is the remedy sought. Although the Patna High Court has drawn a distinction between revenue proceedings arising out of taxation matters and civil proceedings, no such distinction seems to have been raised in the Supreme Court judgment in *A. Thangal Kunju Musaliar* v. *M. Venkatachalam Potti, Authorised official and an other* (3), which I have referred to above. In Kapur Singh's case the complaint of Kapur Singh was that the proceedings which were taken against him under the Public Servants' Inquiry Act and the order passed as a consequence were vitiated because of certain defects which he has pointed out and this Court has overruled those objections. In my opinion this was a determination of his civil rights and there is no doubt that had he brought a suit and wanted to go to the Supreme Court,

(1) C.M. 486 C. of 1951.
(2) A.I.R. 1951 Pat. 626.
(3) 1956 S.C.A. 259.

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the matter would have been covered by Article 133. I cannot see any reason why the nature of proceedings should become different merely because he has sought a remedy in this Court by way of an application under Article 226 rather than come to this Court by way of a suit or appeal as the case may be. The test laid down by the High Court of Patna that if a suit could be brought the proceeding would be civil and if it could not, then it would not be civil, is a good test *qua* the first part, i.e., where a suit could be brought and the petitioner seeks his remedy by way of a prerogative writ, the proceeding would be civil, but I would not go as far as to say that if the suit could not be brought, the proceeding would not be civil in nature. Mahajan, J., in *Khushaldas Advani's case* (1), has held that the word 'sue' includes any remedy that is employed to vindicate a right and any proceeding adopted to put it out of jeopardy and, therefore, an application for a *certiorari* is included in the word "sue". Similarly in England every step in an action is a proceeding.

It is difficult to lay down for all cases as to what would be a civil proceeding and what would be other proceedings. As was remarked by Shearer, J., in *Tobacco Manufacturers* v. *The State* (2), the Constitution has been framed for all times and the framers of the Constitution were providing for all contingencies which may arise. Although it may be difficult to define the words 'other proceeding', one can think of many instances which would fall under that expression and not the expression 'civil proceeding', e.g., an application for a permit under the Motor Vehicles Act, and an application for a mining licence. In Ceylon election petitions for the Legislature were heard by High Court Judges and determination of the rights of contestants although decided by the High

(1) A.I.R. 1950 S.C. 222.
(2) I.L.R. 30 Pat. 174.

Court could not be held to be a civil proceeding. These instances can be multiplied.

According to the Letters Patent of this Court the jurisdiction has been divided into civil, criminal, matrimonial, testamentary and intestate jurisdiction and in clause 10 of the Letters Patent appeals are provided in the exercise of appellate civil jurisdiction but not revisional jurisdiction or jurisdiction of superintendence nor of criminal jurisdiction. In Courts which used to be called Presidency Courts there is also admiralty jurisdiction. Now the High Courts have power of superintendence over all Courts of inferior jurisdiction and tribunals under Article 227 of the Constitution. The words 'civil', 'criminal' and 'any other' have, therefore, been used in their widest sense to cover all these various jurisdictions of the High Courts and superintendence over tribunals.

It was contended that the proceedings against which Kapur Singh made an application under Article 226, of the Constitution of India were merely executive proceedings. One cannot lose sight of the question that Kapur Singh was agitating the question of his right to remain in service and under section 9 of the Civil Procedure Code a suit in which the right to property or to office is contested is a suit of a civil nature and if the test laid down by Mahajan J., in *Khushaldas S. Advani's case* (1), is correct, as we must hold it to be, then any proceeding brought to establish and vindicate his right to an office must be considered to be a civil proceeding even though the final order of dismissal and, therefore, determining his right to office is made by the President in the exercise of his administrative and executive powers. Merely because an act is purely ministerial does not take it out of the definition of the words "civil proceeding". In *Rex* v. *Westminster Assessment Committee* (2), the bringing on the list was a purely

(1) A.I.R. 1950 S.C. 222.
(2) (1917) 2 K.B. 215.

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ministerial act and yet it was held to be a civil cause or matter. See also *London County Council* v. *Islington Assessment Committee* (1).

Advani's case (2) shows that any proceeding in a Court of law brought to vindicate or enforce a civil right would fall within the word "sue" and if a writ of *certiorari* to quash an order of Government requisitioning a flat can fall within the word "sue", it would be difficult to contest that a writ directed against proceedings under Act 37 of 1850 or to challenge the order made as a consequence of those proceedings is not within the words "civil proceedings".

A review of all these authorities shows that the second question referred, whether the proceeding in which the Court declines to issue a writ under Article 226 of the Constitution of India can be regarded as a civil proceeding or not within the meaning of Article 133, cannot be answered by saying just yes or no. It will depend on the facts and circumstances of each case and keeping them in view it has to be determined in each case. But what a civil proceeding is may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right, *Khushaldas Advani's case* (2). It covers every step in an action and is equivalent to an action (*Pryor* v. *City Offices Company*) (3). It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked.

I shall now take up the first question which in both cases is confined to the determination of the nature of a decision declining or refusing to issue a writ under Article 226 of the Constitution of India.

In Article 133(1) of the Constitution of India the words "judgment, decree and final order" are textually the same as those used in section 205 of the Constitution Act of 1935. In the Civil Procedure Code

(1) 1915 A.C. 762.
(2) A.I.R. 1950 S.C. 222.
(3) (1883) 10 Q.B.D. 504.

appeals to the Privy Council and after the abolition of the jurisdiction of the Privy Council and conferment of the jurisdiction on the Federal Court to that Court could be taken against a "decree or final order". Similar appeals under the Letters Patent of the various High Courts were provided against final judgment, decree or order. If there had been no decision interpreting these words in section 205 of the Constitution Act, it might have been possible to argue that the word "judgment" must be read in the same sense as it is used in the Letters Patent of the different High Courts, in clause 15, or 13, or 10 and, therefore, the meaning of the word would be wider. But these words, having received interpretation by the Federal Court in cases decided under section 205 of the Constitution Act, 1935, must have the same meaning in the Articles of the Constitution. In *Hori Ram Singh* v. *The Crown* (1), where these words were held to include decisions given in criminal jurisdiction, the word "judgment" was interpreted by Sulaiman, J., at page 186 as follows:—

> "In view of the observation made by their Lordships of the Privy Council, the word 'judgment' cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court so far as that Court is concerned".

His Lordship also said at page 171 that the terms "judgment" and "final order" are used in one expression and undoubtedly cannot be of different and distinct meanings and a "judgment" cannot be interpreted as embracing even interlocutory orders, which would make the category of "final order" wholly superfluous and unnecessary.

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(1) 1939 F.C.R. 159.

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The term "final order" has an element of finality and it is not a "final order" (see p. 173):—

> "If the effect of the order from which it is sought to appeal is not finally to dispose of the rights of the parties, then even though it decides an important and even a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way".

The learned Judge referred to *Saleman's case* (1), where Lopes, J., said at page 736:—

> "I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties".

In *Venugopala Reddiar and another* v. *Krishnaswami Reddiar and another* (2), it was held that an order of the High Court holding that the lower Court has jurisdiction in the matter and directing it to proceed with the trial of the suit is not a final order within the meaning of section 205 and it was doubted whether such an order would amount to a judgment, and reference was made to the narrow interpretation put upon the word "judgment" by the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (3). The Privy Council in *Abdul Rahman* v. *D. K. Cassim and Sons* (4), held that an order is not final unless it finally disposes of the rights of the parties in relation to the whole suit: see *Ramchand Manjimal* v. *Goverdhandas* (5). The test of finality is whether the order finally disposes of the rights of the parties. Where the order does not finally dispose of those rights but leaves them for the Court to determine in

(1) (1891) 1 Q.B. 734.
(2) A.I.R. 1943 F.C. 24.
(3) A.I.R. 1925 P.C. 155.
(4) I.L.R. 11 Rang., 58 (P.C.).
(5) I.L.R. 47 Cal. 198.

the ordinary way, the order is not final and merely because the order goes to the root of the suit, namely, the jurisdiction of the Court to entertain it, is not sufficient for the purpose of finality, which must be a finality in relation to the suit and if after the order the suit is still alive and the rights of the parties have still to be determined, it cannot be said that it is a final order.

In *Kuppuswami Rao* v. *The King* (1), the expression "final order" in section 205(1) of the Government of India Act was held to mean an order which finally determined the points in dispute and brings the case to an end. The test of finality laid down was whether the order finally disposes of the rights of the parties and not whether the order decides an important, or even a vital issue in the case. "Judgment" was defined to mean the determination of the rights of the parties in the matter brought before the Court, it does not cover a preliminary or interlocutory order in a criminal case. The test given by Lord Alverstone, C.J., in *Hazson* v. *Altrincham Urban District Council* (2), was approved of. The Lord Chief Justice laid down the test in the following words:—

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order".

See also *Sultan Singh* v. *Murlidhar* (3), *Rahimbhoy* v. *Turner* (4), *and Sital Das* v. *S.G.P.C.* (5).

(1) 1947 F.C.R. 180.
(2) (1903) 1 K.B. 547.
(3) I.L.R. 5 Lah. 329 (F.B.).
(4) I.L.R. 15 Bom. 155. (P.C.).
(5) I.L.R. 12 Lah. 435.

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It was argued in *Kuppuswami Rao's case* (1), that because in *Emperor* v. *Sibnath Banerji* (2), the Privy Council had approved of the observations of Sir Maurice Gwyer, C.J., in *Hori Ram Singh's case* (3), the words "judgment", "decree" or "final order" are to receive no narrow interpretation. But Kania, C.J., observed at page 191—

> "We are unable to read those observations as disapproving in any manner the view of Sulaiman J., in *Hori Ram Singh's case* (3), about the true meaning of the words judgment or final order in section 205(1) of the Constitution Act"

Again the words "judgment or final order" were interpreted by the Federal Court in *Mohammad Amin Brothers Ltd.*, v. *Dominion of India* (4). In that case the Dominion of India claimed a sum of Rs. 35,00,000 as due from Mohammad Amin Brothers Limited and applied for compulsory winding up of the company which was made by a Judge of the Calcutta High Court. On appeal an objection raised that the application did not lie as it related to a matter concerning revenue under section 226 of the Government of India Act, was overruled by a Division Bench and it found that a *bona fide* dispute was pending before the income-tax authorities relating to a substantial part of the debt and, therefore, the solvency of the company could not be determined before this dispute was decided. The judgment of the Single Judge was set aside and the case was remanded to him to be taken up after the final determination of the dispute before the incame-tax authorities. An appeal was taken to the Federal Court of India and it was held that this was not a final order, nor a judgment, as it did not

(1) 1947 F.C.R 130.
(2) 1945 F.C.R. 195, 210.
(3) 1939 F.C.R. 159.
(4) 1950 F.C.R. 842.

finally dispose of the rights of the parties to the suit and the appeal was consequently not maintainable. The test laid down by Mukherjea, J., at page 846 was that if the decision on any issue puts an end to the suit, the order will undoubtedly be final, but if the suit is left alive and has got to be tried in the ordinary way, no finality could attach to the order. At page 848, it was observed—

> "If the order which is made in this case is an interlocutory order, the judgment must necessarily be held to be interlocutory judgment and the collocation of the words 'judgment, decree or final order' in section 205(1) of the Government of India Act makes it clear that no appeal is provided for against an interlocutory judgment or order".

In other words it was held that for a decision to fall within the word "judgment" or "final order", it must not be an interlocutory judgment or an interlocutory order.

In *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratan* (1), it was held that an order is not final within the meaning of section 109 of the Code of Civil Procedure unless it finally disposes of the rights of the parties. In that case the Appeal Court reversed an order of the Court of first instance whereby a suit to recover damages for breach of contract was stayed on the ground that the contract contained an arbitration clause, and being of the opinion that the order was a final order, gave a certificate under section 110 of the Civil Procedure Code. Upon a preliminary objection being taken at the hearing of the appeal it was held by the Judicial Committee that the order appealed from was not a final order.

(1) 47 I.A. 124.

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In *Seth Premchand Satramdas* v. *The State of* Bihar (1), an appeal was sought to be taken against an order of the Patna High Court dismissing an application under section 21(3) of the Bihar Sales Tax Act to direct the Board of Revenue to state a case and refer it to the High Court. It was held that such an order is not a final order within the meaning of clause 31 of the Letters Patent of the Patna High Court as the jurisdiction exercised by the High Court is consultative and the order made is merely advisory and standing by itself, it does not bind or affect the rights of the parties. At page 804 Fazl Ali, J., observed—

> "It is true that the Board's order is based on what is stated by the High Court to be the correct legal position, but the fact remains that the order of the High Court standing by itself does not affect the rights of the parties, and the final order in the matter is the order which is passed ultimately by the Board of Revenue. This question has been fully dealt with in *Tata Iron and Steel Company* v. *Chief Revenue Authority, Bombay* (2), where Lord Atkinson pointed out that the order made by the High Court was merely advisory."

The Supreme Court quoted with approval the observations of Lord Esher M.R. in *In re Knight and the Tabernacle Permanent Building Society* (3)—.

> "In the case of *Ex parte County Council of Kent,* where a statute provided that a case might be stated for the decision of the Court it was held that though the language might *prima facie* import that there has to be the equivalent of a judgment or

(1) 1950 S.C.R. 799.
(2) 50 I.A. 212.
(3) (1892) 2 Q.B. 613, 617.

order, yet when the context was looked at it appeared that the jurisdiction of the Court appealed to was only consultative, and that there was nothing which amounted to a judgment or order".

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This decision of the Supreme Court shows that any opinion given by a High Court in its consultative capacity does amount to a judgment or a final order within the meaning of the words as used in the Constitution of India. This judgment does not accept the decision of the Lahore High Court in *Feroze Shah Kaka Khel* v. *Income-tax Commissioner, Punjab, and N.W.F.P., Lahore* (1). The Madras High Court in *Messrs P.A. Raju Chettiar and Brothers* v. *Commissioner of Income-tax, Madras* (2), held that an appeal lies to the Federal Court from the judgment of the High Court delivered on a reference made under section 66 of the Income-tax Act. It held such a decision to be a judgment (P. 250).

In another case decided in 1951, *The State of Orissa* v. *Madan Gopal Rangta* (3), where the Court declined to decide the rights of parties and directed them to have their rights determined by a civil suit but at the same time gave an interim relief under Article 226 till such suit was filed, it was held to be a final order "in view of the fact that with these orders the petitions were disposed of finally and nothing further remained to be done in respect of the petitions. The fact that the operation of the order is limited to three months or a week after the filing of the intended suit does not prevent the order from being final. It was also held in this case (at p. 33)

> "The language of the Article (226) shows that the issuing of writs and directions is founded only on its decisions that a right of the

(1) A.I.R. 1931 Lah. 138.
(2) I.L.R. 1950 Mad. 248.
(3) 1952 S.C.R. 28.

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aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article."

In *Asrumati Debi* v. *Kumar Rupendra Deb Raikot* (1), an order under clause 13 of the Letters Patent of the Calcutta High Court transferring a suit from a subordinate Court to the High Court was held not to be a judgment. Although the divergence of judicial opinion was pointed out but the meaning of the word "judgment" within clause 15 of the Letters Patent was not decided. Mukherjea J., observed at page 324:—

> "A final judgment is an adjudication which conclusively determines the rights of the parties with regard to all matters in issue in the suit, whereas a preliminary or an interlocutory judgment is a decree by which the right to the relief claimed in the suit is decided but under which further proceedings are necessary before a suit in its entirty can be disposed of. Save and except final and preliminary judgments thus defined all other decisions are holders and they do not come within the description of judgments under the relevant clause of the Letters Patent."

The Bombay High Court in *Jamnadas-Prabhudas* v. *The Commissioner of Income-tax Bombay, City* (2), held that the expression "judgment, decree or

(1) 1953 S.C.A. 319.
(2) I.L.R. 1953 Bom. 549.

final order" in Article 133 is used in its technical English sense, which means a final declaration or determination of the rights of the parties if given on merits. The expression is a compendious one, each one of the parts of which means that there is an adjudication by the Court upon the rights of the parties who appear before it. That was a case of an income-tax reference and it was held that the jurisdiction of the Court is advisory and consultative even though the income-tax authorities are bound to act in accordance with the decision given by the High Court. But the decision that it gives is not a judgment within the meaning of Article 133(1) of the Constitution of India. The decision given by the Madras High Court in *Messrs P. A. Raju Chettiar and Brothers* v. *Commissioner of Income-tax, Madras* (1), was not accepted in this case. The question was also raised in this Bombay case as to whether the proceedings were civil proceedings, but it was not decided as being unnecessary.

The Privy Council in *Tata Iron and Steel Company Limited* v. *Chief Revenue-authority of Bombay* (2), pointed out the distinction between the determination being final or advisory. It was held that in such cases it is necessary to examine closely the language of the enactment under which the case is stated. Where it is stated for the opinion of the Court, the order is advisory and where it is stated for decision or determination of a question it is difficult to hold that the order would be merely advisory, even though it may not be decisive. At page 741, it was observed that the decision, judgment or order made by a High Court under section 51 of the Income-tax Act was merely advisory and not in the proper and legal sense of the term "final", and the appeal was, therefore, incompetent. The Calucutta High Court in *Prabhat Chandra*

(1) I.L.R. 1950 Mad. 218.
(2) I.L.R. 47 Bom. 724.

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Barua v. *Emperor* (1), held that no appeal lies against the decision of the High Court in a reference under section 66(2) of the Indian Income-tax Act because "the judgment given upon the case stated is merely advisory, made by the Court in exercise of its consultative jurisdiction, and is not a judgment within the meaning of clause 15 of the Letters Patent."

In another Madras case *H. Chandanmul and Co.*, v. *Mohanlal M. Mehta*, (2), it was held that it is only a final judgment that falls within the category of judgment in Article 133(1) of the Constitution. In that case a notice of filing of an award was served upon the petitioner and instead of filing an application to set aside the award within the time prescribed by Article 158 of the Limitation Act the petitioner filed an application which purported to be under section 5 of the Limitation Act for excusing the delay in filing the application which was dismissed by the High Court and the petitioner sought leave to appeal to the Supreme Court. It was held that an order refusing to condone delay in filing an application could not be treated as a judgment, even though it might have far-reaching consequences and adversely affect the rights of the parties. The test laid down in the case was that the use of the word "judgment" or "final order" does not make any difference and the word "judgment" connotes a final judgment and not an interlocutory one.

Counsel referred to two cases of this Court. In *Jagat Ram* v. *Ganga and others* (3), it was held that an order rejecting an application to appeal *in forma pauperis* is not a judgment, decree or final order within the meaning of Article 133 and that the "judgment" in Article 133 means a final judgment and not an interlocutory one. At this stage reference may be made to

(1) I.L.R. 52 Cal. 546.
(2) A.I.R. 1953 Mad. 727.
(3) A.I.R. 1951 Punjab 30.

a judgment of Sir Trevor Harries, C.J., in *Rajkumar Chandra* v. *Midnapore Zamindary Co., Ltd.*, (1). In that case again the test laid down for determining whether a decision falls under the word "judgment" or "final order" was that it should finally decide the rights of the parties. In *Pahlad Rai and Company* v. *Commissioner of Income-tax for the State of Punjab* (2), the question was again raised in a matter arising out of an income-tax case in which order was made under section 66(2) of the Income-tax Act dismissing the application for directing the Tribunal to state a case and it was held that it was not a judgment, decree or final order within the meaning of Article 133.

I now come to the cases decided by the Nagpur High Court. In *Messrs Hoosen Kasam Dada* v. *The State* (3), an order rejecting a petition under Article 226 of the Constitution of India to issue a direction to the Commissioner of Sales Tax to admit the petitioner's appeal was held not to be a judgment or final order within the meaning of Article 133(1) of the Constitution because it did not dispose of finally the rights of the parties and did not give any decision on merits. The Court was of the opinion that a judgment or final order to be appealable must affect the merits of the case between the parties by determining some right or liability and as in that case there was no order on merits, i.e., with regard to the applicant's liability to pay the tax and there was no determination of any right, the decision could not be regarded as a judgment or a final order. It was observed at page 209—

> "This Court has done no more than to point out to the applicant that the Act must be complied with."

(1) 54 C.W. No. 874.
(2) A.I.R. 1952 Punjab 299.
(3) I.L.R. 1952 Nag. 204.

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Obviously that was not a judgment or final order as defined in the cases decided by the highest tribunals.

The word "judgment" came for interpretation by the Nagpur High Court again in *Shriram* v. *State of Madhya Pradesh* (1), and it was held that until a decision finally disposes of the rights of the parties it is not a judgment. It was also held that ordinarily the extraordinary jurisdiction vested in the High Court under Article 226 is not meant to declare any rights and a writ issues only to ensure that the law of the land is being properly administered and the refusal to issue the writ has only the effect of saying that the High Court does not see any irregularity in the administration of the relevant law and such a decision is not a judgment or final order. That was a case which related to a prospecting licence in respect of an area of land. The application of the petitioner for a licence was granted. One M.G. Rungta was also interested in some area which was covered by the licence in favour of the petitioner and his application for a prospecting licence was rejected by the State Government but on a review a direction was given by the Central Government to the State Government to modify its order. The petitioner moved the High Court under Article 226 for quashing the order of the Central Government which was refused. The Court held that the Central Government was not bound to give a hearing to the applicant when the matter came before it for review and also that the State being the owner of the land could lease whole or any portion of it to whomsoever it chose and the Court could not interfere in such matters. This was held not to be a judgment or final order. In this case no rights of any kind were decided and the petition was dismissed really on the ground that the complaint made by the petitioner that he was not given a hearing was untenable, and, therefore, it could not be a judgment or a final order.

(1) A.I.R. 1955 Nag. 257.

I would now refer to an unreported case decided by this Court, *Sarup Lal* v. *Kaushalaya Devi* (1). In that case 31 *bighas* of land were sold in favour of Kaushalaya Devi and disputes arose as to the mutation in the Revenue Department. Sarup Lal ultimately took the matter to the Chief Commissioner and complained that in spite of the stay order granted by him the land had been demarcated and mutation had been sanctioned in favour of the vendees and that the proceedings had been kept secret from him and were illegal. The Chief Commissioner allowed this petition and set aside the mutation order. On an application to this Court the order of the Chief Commissioner was quashed and, therefore, the consequence of this order was that the mutation of names in favour of the vendees was allowed to stand unaffected. An application was made for leave to appeal to the Supreme Court and it was held by this Court that this was a final order within the meaning of Article 133 of the Constitution of India and cases under the Sales Tax Act and Income-tax Act were distinguished on the ground that the orders given were in the advisory jurisdiction of the High Court and did not decide finally the rights of parties and were, therefore, not final orders. It cannot be said that the decision of this Court in that case did not decide the rights of the parties or did not give a finality as far as the Revenue Department was concerned and nothing remained to be done in the mutation proceedings. Nor was it a case where the Court refused to grant the application of the petitioner. The decision was in accordance with the tests laid down by the Supreme Court and the Federal Court in the cases which I have discussed above.

It is not necessary to deal with cases which fall under clause 10 of the Letters Patent of this Court which corresponds to clause 15 of the Letters Patent

(1) C.M. No. 169-D of 1954.

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of what used to be Presidency High Courts, because the words used in the Constitution are textually the same as those used in section 205 of the Constitution Act of 1935 and they have been interpreted by the Federal Court and the Supreme Court to connote final determination of the rights of the parties. But as some of those cases may be useful I would refer to only some of them. In *Central Brokers* v. *Ramanarayana Poddar and Company* (1), an order under section 10 of the Code of Civil Procedure for the stay of trial of a suit was held not to be a judgment within the meaning of the term. Mack, J. pointed out that the appealability would ultimately depend upon the order itself. In that case the Madras High Court reviewed all the cases of the various Courts. The Lahore High Court in *Ruldu Singh* v. *Sanwal Dass* (2), said that it is impossible to lay down any definite rule which would meet the requirements of all cases, and in determining whether an order constitutes a judgment or not the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it is made. The definition given by Sir Arnold White C.J., in *Tuljaram* v. *Alagappa* (3), was relied upon as being the most satisfactory test. *Asrumati's case* (4), was under this clause.

A review of all these decided cases shows that in order that a decision should fall within the definition of the word "judgment" or "final order" (1) it must finally decide the rights of the parties and the word "judgment" means a final judgment and not an interlocutory judgment, and by which right to the relief claimed is decided with regard to all matters in issue, and (2) an order is final if it finally disposes of the

(1) I.L.R. 1954 Mad. 1052.
(2) I.L.R. 3 Lah. 188.
(3) I.L.R. 35 Mad. 1 (F.B.).
(4) 1953 S.C.A. 319.

rights of the parties and if it does not, it is not final even though it may decide a vital issue in the case.

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So in every case the Court has to see whether the rights of the parties are finally determined by a decision so that the answer to the first question in both cases is that the mere fact that the Court refuses to issue a writ or direction under Article 226 does not take it out of the definition of the words "judgment, decree or final order" but it will depend upon the facts, circumstances and the nature of decision in each case.

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I have already answered the second question referred to this Bench and that also cannot be answered by a simple yes or no. Its answer like that to the first question will depend on the facts of each case.

BHANDARI, C.J.—I agree.

Bhandari, C.J.

KHOSLA, J.—I have nothing to add to the order proposed by Kapur, J.

Khosla, J.

FULL BENCH

CRIMINAL REVISIONAL

Before Falshaw, Passey and Mehar Singh, JJ.

HAKIM RAI,—*Petitioner*

versus

THE STATE,—*Respondent*

Criminal Revision No. 236 of 1955.

Jan., 4th 1957

Code of Criminal Procedure (V of 1898)—Sections 476 and 476B—Civil Court ordering the filing of complaint under section 476—Appeal against the order dismissed by the Court to which the Civil Court is subordinate—Whether the revision against the order of appellate Court be a revision under Section 115 Civil Procedure Code or under 439 Criminal Procedure Code.

Held, that an appeal under section 476B of the Criminal Procedure Code is entirely a creature of and governed by the provisions of that Code and has nothing to do with the